Supreme Court, U.S.
FILED
JUN 3 1997
CLERK

(3)

No. 96-1473

IN THE
Supreme Court of the United States
October Term, 1996

OPHEL H. ZEVALKINK,
Petitioner,
v.
JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS,
Respondent,

ELEANOR M. HESSE,
Petitioner,
v.
JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Not so long ago, the United States cared deeply about its responsibility to the surviving spouses of veterans killed or disabled as the result of service to the Nation in wartime. That time has surely passed. So much so, in fact, that Respondent's primary aim now apparently is to bury the central issue in this case—whether a surviving spouse may continue the veteran's pending appeal for wrongly-withheld disability benefits.

Significantly, Respondent does not contest "the background rule under all federal benefits statutes [ ] that claims survive the death of the claimant." Resp. Br. at 8, n.6; *see* Pet. at 8-12. Yet, based solely on the decision below and *Landicho v. Brown*, 7 Vet. App. 42 (1994), the United States argues, albeit only in a footnote, that "Congress could not have been more explicit" that "veterans' claims do *not* survive their deaths," and "that only Section 5121 authorizes" even a limited recovery of as much as two years of back disability benefits. Resp. Br. at 5, 8, n.6 (emphasis added). As summarized below, Respondent's surprising argument that all federal benefit claims except those of veterans survive the death of the beneficiary is both unfair and contrary to logic and law.

A. Respondent Cannot Bury the Central Issue of Claims Survival Presented by the Petition.

Petitioner Hesse is now, and always has been, pursuing the action for wrongly-withheld benefits pending at her husband's death. Respondent should not be permitted to sidestep that issue as a means of avoiding the manifest conflict here with decisions of this and other courts under comparable benefits statutes. *See* Pet. at 8-12. Indeed, any other result would encourage the government to drag out the claims and appellate process until the veteran's death.

1. Petitioner Hesse represents the claim of her deceased husband.

Respondent argues that "Petitioner Hesse does not . . . assert a substantive right to benefits greater than what Section 5121 provides to surviving spouses." Resp. Br. at 8. That argument is wrong. Petitioner Hesse asserts the claim of her deceased husband, including the right of his estate to recover far more than the two years of benefits provided for surviving spouses by § 5121. Specifically, Petitioner Hesse seeks partial disability benefits improperly withheld from her husband since 1945 when, according to a 1945 VA Form P-80a, "he had been awarded a 10% disability rating for a lung condition." Pet. App. at 59a. Thus, as the United States Court of Veterans Appeals ("CVA") found in *Hesse v. Derwinski*, 2 Vet. App. 359, 361 (1992), when it reversed Mrs. Hesse's initial denial of benefits:

> Upon review, we are first and foremost struck by the observation that during the veteran's lifetime, he was apparently awarded a 10% disability rating for a lung condition; yet he never received any compensation under that rating, nor does the record suggest that the award was rescinded or the rating reduced.

Pet. App. at 61a. This CVA finding was rejected on remand to the Board of Veterans Appeals ("BVA")—not on the merits—but rather because Petitioner Hesse was understandably reluctant to turn over her original copy of the 1945 VA Form P-80a after VA officials had inspected that critical document at her home. Without the original copy, the Board in 1993 denied Petitioner Hesse's claim under a version of the "best evidence rule" which it gleaned from *Black's Law Dictionary*. Pet. App. at 48a.

2. Petitioner Hesse appealed the CVA's denial of her right to assert the claim of her deceased husband's estate.

When Petitioner Hesse appealed the above-described, 1993 BVA decision to the Court of Veterans Appeals, she was confronted for the first time with the CVA's recent decision in *Landicho v. Brown*, 7 Vet. App. 42 (1994). Shortly after her husband died in 1990, Mrs. Hesse (proceeding *pro se* under then-applicable Interim General Rule 43) requested that she be authorized to continue prosecution of her deceased husband's case. At the request of the Clerk of the CVA, she provided the necessary letter, dated January 14, 1991, affirming that she was the "personal representative of the deceased appellant's estate." *See Hesse v. Brown* (No. 95-7012), J.A. at A00438, A00436-37; *see also* App. Br. 7-8; A0439 (Hesse letter in record but not reproduced in J.A.) Under Interim General Rule 43 (comparable to Federal Rule of Appellate Procedure 43(a)), Mrs. Hesse thus was allowed to proceed as the estate's personal representative. Pet. App. 57a But after *Landicho*, which purported to extinguish the claim of the veteran's estate, she was left with no choice but to file a motion for voluntary dismissal of her appeal on the condition that she be allowed to test the legal correctness of *Landicho* on appeal to the Federal Circuit. Pet. at 4.

3. Petitioner Hesse's appeal to the Federal Circuit did not change the nature of her claim.

Respondent argues that, with Petitioner Hesse's appeal to the Federal Circuit, her claim somehow changed: she was no longer pursuing her husband's claim on behalf of his estate but rather only her own right to "accrued benefits" under the "derivative claim" provided in § 5121. Resp. Br. at 8. For this astounding proposition, Respondent miscites various pages from the Petition to this Court which it says show that Petitioner Hesse does not "claim entitlement to benefits independently of Section 5121." *Id.* But, in fact, the Petition

says just the opposite. For example, after noting the existence of a separate "claim for accrued benefits," Petitioner explained § 5121 as a remedial "death statute[] drafted in the early part of the century" which was designed to provide additional benefits that "are not the same as those that would be available in the event of a successful appeal." Pet. at 11. Likewise, in response to Respondent's argument that "the widow may not pursue her husband's appeal," the Petition emphasized that "the CVA and the Federal Circuit stand alone against the tide of decisions that provide for survival of similar government benefit claims, where the entitling statutes are silent as to claims survival." *Id.* at 7. Nor does anything in the Federal Circuit's opinion suggest Petitioner Hesse was pursuing only an accrued benefits claim.

B. Respondent Should Not Be Allowed to Confuse Claims Survival with the Separate Issue of Entitlement to Accrued Benefits under § 5121.

Claims survival and entitlement to accrued benefits are separate issues both in law and as framed by the Petition before this Court. Respondent should not be allowed to raise a smoke screen that merges or confuses these two separate issues.

1. The consolidated Certiorari Petitions of Hesse and Zevalkink present separate issues of claims survival and entitlement to accrued benefits under § 5121.

Respondent deliberately attempts to cloud the separate issues presented here by recasting the consolidated Petitions in terms of § 5121. Resp. Br. at 9. But as is evident from the two Questions Presented in the Petition itself, Petitioners Hesse and Zevalkink raise separate, albeit overlapping issues. Petitioner Hesse is pursuing her husband's claim as personal representative of his estate. (Question 1.) Petitioner Zevalkink is pursuing only her entitlement to accrued benefits under § 5121 since there was no appeal pending on behalf of her

husband at his death. (Question 2.) Section 5121 comes into play in Petitioner Hesse's case only if (1) *Landicho* is correct that her husband's claim was extinguished at death and if (2) she is precluded (as the decision below may be read to imply) from raising in a subsequent § 5121 proceeding the issues presented in her husband's appeal pending at his death. This point, as well as Petitioner Zevalkink's broader claim of entitlement to challenge under § 5121 all "factual and legal issues that were previously decided against the veteran," are included within Question 2.

2. Properly understood, claims survival and § 5121 work *in pari materia*.

Hesse is the atypical case in which a veteran has a pending disability claim at his or her death. Absent a clear statement of contrary congressional intent, the background rule is that such claims survive and may be pursued by the representative of the decedent's estate. Pet. at 8-12. Respondent does not contest this rule but argues instead that "Congress could not have been more explicit in confining a surviving spouse's substantive entitlement . . . to the benefits described in Section 5121." Resp. Br. at 8, n.6. In support of this supposedly "explicit" congressional intent, Respondent offers—not statutory text or even legislative history—but only *Landicho* and the decision below. *Id.* at 8-9. Respondent never answers Petitioners' construction of § 5121—namely, that it applies in the typical case (like Zevalkink) where the veteran has no pending disability claim at death but where the veteran may have been entitled to "periodic monetary benefits . . . under existing ratings or decisions, or those based on evidence in the file at date of death . . . ." 38 U.S.C. § 5121(a). This natural construction of § 5121 thus provides a limited dispensation (a maximum of two years' benefits) to persons like Mrs. Zevalkink, whose spouse may not have diligently pursued viable disability claims during his or her lifetime.

3. The showing required for a recovery of benefits under § 5121 cannot be defined by the *post hoc* arguments of Respondent's counsel.

Respondent wrongly characterizes Petitioners as arguing that "an accrued benefit claimant . . . stand[s] in a procedural posture superior to that occupied by the veteran before his or her death." Resp. Br. at 10. Accepting, as Petitioners do, that the accrued benefit claimant is in the same position as the decedent, there remains the question of what showing would have been required for the veteran to make out a valid claim for benefits before his or her death. Citing the VA's own statutes and regulations, Petitioners identified the many circumstances including "obvious error," change of law, "clear and unmistakable error," and "difference of opinion" that are available for veterans wishing to reopen previous benefit denials. Pet. at 15.

Rather than address these points, Respondent's counsel proceeds to interpret the statutory term "new and material evidence," largely without reference to the VA's regulations. Resp. Br. at 11-12. Likewise, with respect to Petitioner Hesse's legitimate concern about potentially being "collaterally estopped from challenging the factual and legal issues that were the subject" of her husband's dismissed appeal, Respondent's counsel reads into the Federal Circuit's decision an assurance that is not there. In fact, the decision below is entirely silent as to whether the pending appeal would be dismissed without prejudice to the right of the appellant to present the same issues again in a § 5121 proceeding. Needless to say, the arguments of Respondent's appellate counsel cannot define the scope of Petitioner Zevalkink's potential recovery under § 5121, much less guarantee preservation of Petitioner Hesse's claim for two years in back benefits in the event that dismissal of her appeal to the Court of Veterans Appeals were to be upheld by this Court.

CONCLUSION

For the foregoing reasons, the writ of *certiorari* should be granted.

Respectfully submitted,

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Dated: June 3, 1997